Supreme Court, U.S.
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In The

Supreme Court of the United States

JENNIFER LINDER (JOHNSON),

Petitioner,

v.

DERON JOHNSON,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Arkansas, Division Two

PETITION FOR WRIT OF CERTIORARI

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May 8, 2007

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QUESTIONS PRESENTED

Was petitioner denied due process of law when the state court allowed testimony regrading Parental Alienation Syndrome without applying the principals set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)?

Was petitioner denied due process of law when the state court deferred to the trial court's determination of the credibility of the witnesses when there was evidence that the trial court was bias and the key witness did not testify in person before the trial court? *Codd v. Velger*, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977); *Withrow v. Larkin*, 421 U.S. 35, 46, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975).

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jennifer Linder, respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Court of Appeals of which the Supreme Court of Arkansas denied review in a split decision.

OPINIONS BELOW

The opinion of the Arkansas Court of Appeals (App. 1) is reported at 2006 Ark. LEXIS 780 (November 29, 2006).

JURISDICTION

The Arkansas Court of Appeals decided the appeal in this case on November 29, 2006. (App. 1) The Arkansas Court of Appeals denied a rehearing on January 17, 2007. The Arkansas Supreme Court denied review on February 8, 2007.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution, § 1, provides as follows:

> [n]or shall state deprive any person of . . . liberty . . . without due process of law; . . . .

RULE OF EVIDENCE INVOLVED

A.R.E., Rule 702

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Section 5 of Administrative Order No. 15 of the Arkansas Supreme Court

> a. An attorney ad litem shall conduct an independent investigation consisting of review of all relevant documents and records. The ad litem shall interview the child, parents, and others having relevant knowledge to assist in representation. Continuing investigation and regular contact with the child during the pendency of the action are mandatory. Upon entry of a final order, the attorney ad litem's obligation to represent the minor child shall end, unless directed otherwise by the court.
>
> b. An attorney ad litem shall determine the best interest of a child by considering such custody criteria as:
>
> > (1) *Moral Fitness* factors: integrity, character, compassion, sobriety, religious training and practice, a newly acquired partner regarding the preceding elements;
> >
> > (2) *Stability* factors: emotional stability, work stability, financial stability, residence and school stability, health, partner stability;

---

(3) *Love and Affection* factors: attention given, discipline, attitude toward education, social attitude, attitude toward access of the other party to the child, and attitude toward cooperation with the other party regarding the child's needs;

(4) *Other Relevant Information* regarding the *child* such as stated preference, age, sex, health, testing and evaluation, child care arrangements; and regarding the *home* such as its location, size, and family composition.

c. An attorney ad litem shall appear at all hearings to represent the best interest of the child. All relevant facts should be presented to the court and if the child's wishes differ from the ad litem's determination of the child's best interest, the ad litem shall communicate the child's wishes to the court, as well as the recommendations of the ad litem.

d. An attorney ad litem shall file appropriate pleadings on behalf of the child, call witnesses, participate fully in examination of witnesses, present relevant evidence, and advocate for timely hearings.

e. An attorney ad litem shall explain to the child the court proceedings and the role of the ad litem in terms that the child can understand.

f. An attorney ad litem shall make recommendations to the court for specific and appropriate services for the child and the child's family. All recommendations shall likewise be communicated to the attorneys for the parties, or if a party is *pro se*, then to the party.

g. An attorney ad litem shall not be prevented by any privilege, including the lawyer-client privilege, from sharing with the court all information relevant to the best interest of the child.

h. An attorney shall not accept appointment to any case for which he or she cannot devote the requisite amount of time to comply with these standards of practice and the Model Rules of Professional Conduct.

STATEMENT

A. Introduction

On or about December 23, 1998, a divorce decree was entered whereby Jennifer Linder was awarded custody to the parties minor children, namely Keith and Sky. (T. 88) Deron Johnson was to have visitation with the minor children every other weekend, one evening per week, part of the Christmas holiday, Thanksgiving holiday every other year, spring break every other year, other alternating holidays, and two weeks in the summer. (T. 89-90) In addition, Deron Johnson was to pay child support to Jennifer Linder in the amount of $95.00 per week and maintain health insurance on the children. (T. 91)

Within a month, Deron Johnson filed a motion for modification of the divorce decree and requested psychological counseling. (T. 95) On November 8, 2001, Deron Johnson notified the court that the matter had been resolved and dismissed the petition. (T. 114) On December 28, 2001, Deron Johnson filed another petition requesting that Jennifer Linder be held in contempt and that there be

a change in the visitation (T. 115), an amended it requesting that he be granted custody. (T. 122-23) After Jennifer Linder filed a response requesting supervised visitation by Mr. Johnson. (T. 357) In an Order of Continuance entered October 22, 2002, Deron Johnson dismissed his request for a change of custody and Jerri Grady was appointed to act as Guardian ad litem for the minor children. (T. 362)

Another petition was filed by Deron Johnson on November 18, 2004 requesting that Jennifer Linder be held in contempt for moving to Florida on August 12, 2004. (T. 406) On July 28, 2005, an Order for Psychological Testing was entered by the court. (T. 429) The parties and the minor children were ordered to undergo psychological testing with Dr. Paul DeYoub. (T. 429) As a result of the testing, Dr. DeYoub submitted a psychological evaluation report. (T. 506) Deron Johnson subsequently filed an amended petition for modification of custody. (T. 444)

B. The evidence at the hearing

A six-day hearing was held in late September 2005. Mr. Johnson presented Dr. Paul DeYoub, a psychologist to support his claim as to Parental Alienation Syndrome (PAS). He indicated, over the objection of Ms. Linder (T. 811, 813), that this was a case of PAS (T. 836) and recommended a change of custody along with supervised visitation for Ms. Linder. (T. 844) On cross-examination, Dr. DeYoub admitted that PAS was not a diagnosis (T. 850), nor was it a mental disorder. (T. 853) He even admitted that there was no test for PAS. (T. 853) At the same time, Dr. DeYoub testified that he reached clinical conclusions based upon examination of the parties and the use of

psychological testing (T. 867) and based his recommendation upon PAS research.

Ms. Linder presented Dr. Bethel Thomas, Jr., a psychologist who had spent considerably more time with the family. While Dr. DeYoub only spent 8 hours with Ms. Linder, 7 hours with Mr. Johnson and 1 ½ hours with the minor children (T. 895), Dr. Thomas had been with the family even prior to the divorce. (T. 1074) Ms. Linder had brought the children to him prior to a court order to resolve the trauma resulting from visits. (T. 1078-1079) His primary focus at that time was on the children in order that visits with Mr. Johnson would be beneficial to both Mr. Johnson and the children.

From the outset, Dr. Thomas worked to create a positive environment for the visitation. (T. 1083) The children were of the opinion that the visitation was not productive and they were frightened by the visitation. (T. 1085) Dr. Thomas was concerned that nobody wanted to listen to the children. (T. 1088)

The first visit was great, but the second visit was traumatic. (T. 1089) Julia Cleeks, a neighbor of Ms. Linder, drove the children to their visit with Mr. Johnson. (T. 1304) According to Ms. Cleeks, Susan Miles, who the children did not know, gets into the car upon their arrival and tells the children to get out of the car. (T. 1306) The children only thought that Mr. Johnson was going to be there and were scared. Ms. Miles told the children that their mother was going to jail. (T. 1307) When the children would not get out of the car, they were physically forced out of the car by Mr. Johnson. (T. 1307-1309) The entire time, the children were screaming. (T. 1310) As Dr.

Thomas explained, the children felt that they were betrayed by the process. (T. 1090)

As a result of the traumatic visitation experience, Dr. Thomas obtained an order from the judge in a separate proceeding, stopping all visitations. (T. 1092) At that time, Dr. Thomas was attempting to do damage control. It was Dr. Thomas's opinion that Ms. Linder was cooperating but Mr. Johnson was not putting forth any effort. Dr. Thomas recommended a gradual plan for the visitation, due to the justifiable fears of the children. (T. 1097-1098) Mr. Johnson was displeased with the process and he exercised his last visit on March 21, 2002. (T. 1101) Mr. Johnson never gave the process a chance. (T. 1101)

Dr. Thomas was shocked by Dr. DeYoub's report in which he dismissed the abuse allegations and mocked the children. (T. 1111) He opposed Dr. DeYoub's recommendation for a change of custody and stated that it was the worst option. (T. 1116) As he explained, there had been a systematic negative experience for the children as a result of the threats to place their mother in jail and the threats of court action. (T. 1117)

Following the hearing, the trial court entered a handwritten order that required the children to be transported to Methodist Behavioral Hospital for immediate assessment and in-patient care. (T. 557) The order also transferred custody of the minor children to Deron Johnson with Jennifer Linder not being awarded any visitation rights with the children. (T. 568) In addition, the court found Jennifer Linder in contempt and ordered that she be incarcerated for a period of one year. (T. 570)

C. The appeal

The Arkansas Court of Appeals affirmed the change of custody on November 29, 2006. 2006 Ark. LEXIS 780 (November 29, 2006). In its opinion, the trial court never addressed the issue of the admissibility of PAS even though it was raised by Ms. Linder. The Court merely deferred to the findings of the trial court and relied upon the testimony of Dr. DeYoub to affirm the change of custody. A petition for rehearing was filed to have the Court address the issue of the admissibility of PAS but it was denied on January 17, 2007. The Arkansas Supreme Court also denied review on February 8, 2007 in a split decision.

REASONS FOR GRANTING THE PETITION

I.

THE DUE PROCESS IMPLICATIONS OF THE ADMISSION OF PARENTAL ALIENATION SYNDROME TESTIMONY WITHOUT EVIDENCE THAT IT HAS BEEN ACCEPTED IN THE SCIENTIFIC COMMUNITY IS AN IMPORTANT QUESTION THAT NEEDS TO BE DECIDED BY THIS COURT. THE ARKANSAS SUPREME COURT HAS FAILED TO APPLY THE PRINCIPALS OF *DAUBERT V. MERRELL DOW PHARMACEUTICALS*, 509 U.S. 579 (1993) AS PREVIOUSLY ADOPTED BY THE ARKANSAS SUPREME COURT OR ITS OWN RULES OF EVIDENCE

Dr. Paul DeYoub was the psychologist called by Deron Johnson to support a claim of Parental Alienation Syndrome (PAS). He indicated, over the objection of Ms. Linder (T. 811, 813), that this was a case of PAS.

(T. 836) Based upon the finding of PAS recommended a change of custody and supervised visitation for Ms. Linder. (T. 844) The trial court followed the recommendation of Dr. DeYoub and the state appellate court affirmed the decision without applying *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The trial court was required to act as a "gatekeeper" under *Daubert, supra*, and the Arkansas Supreme Court decision in *Farm Bureau Mut. Ins. Co. of Ark. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000). It was the responsibility of the trial court to make a preliminary assessment of whether the reasoning or methodology underlying expert testimony was valid and whether the reasoning and methodology used by the expert has been properly applied to the facts of the case. Even though Ms. Linder challenged the admissibility of the PAS testimony, the trial court permitted its introduction. On appeal, the Arkansas Court of Appeals and the Arkansas Supreme Court refused to address the issue.

The use of PAS as justification for the removal of children from their home and severance of parental rights has occurred through the United States. Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, Children's Legal Rights Journal, Vol. 26, No. 1, page 1 (Spring 2006). The vast majority of cases that reference PAS but do not make specific findings as to the admissibility of the PAS. *Id.* at 3-4. The two cases that squarely addressed the issue of admissibility under *Daubert* have held that PAS was not admissible. *Id.* at 3. Since the use of PAS has spread across the country and has been used to the detriment of hundreds of children, the issue of the admissibility of PAS should be decided by this Court.

A. The ruling of the Arkansas Supreme Court conflicts with prior holdings of this Court and should now be resolved by this Court

This Court in *Daubert, supra,* set forth standards to ensure that the scientific evidence is not only relevant, but reliable. *Id.* at 589. The factors to be considered by the trial court were:

1. Whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested;

2. Whether the theory or technique has been subjected to peer review and publication;

3. In the case of a particular scientific technique, whether the theory has a potential rate of error;

4. Whether the theory has "general acceptance" of a relevant scientific community.

Id. at 594-95. This trial court inquiry was adopted by the Arkansas Supreme Court. *Farm Bureau Mut. Ins. Co. of Ark. v. Foote, supra.*

In the trial court's opinion, the judge made numerous references to the testimony of Dr. DeYoub and the systematic alienation of the children. The Arkansas Court of Appeals discusses, in detail, the recommendation of Dr. DeYoub, but ignores the issue of the PAS. In reaching its conclusion to affirm the change of custody, the Court stated:

> On these facts, we agree that custody should be changed to the father. Dr. DeYoub determined that Jennifer completely alienated Sky and Keith

> from Deron; and that Jennifer should have supervised visitation. He based his conclusion, in part, *on research showing that children who had been completely alienated from their parents tend to remain completely alienated unless their access to the restricting parent is reduced or eliminated.* Thus, the trial court was justified in changing custody to Deron, the alienated parent, and in temporarily restricting the children's access to Jennifer, the parent who caused the alienation. . . .

Id. at 33-34 (emphasis added). It is clear from this quote from the opinion that the trial court and the Court of Appeals relied upon PAS since the reach referred to by Dr. DeYoub dealt with PAS. Following the issuance of this opinion, Ms. Linder petitioned the Arkansas Court of Appeals for a rehearing to resolve the issue of the admissibility of the PAS and petitioned for review of the issue by the Arkansas Supreme Court. Both petitions were denied, although the petition for review would have been granted by three of the Supreme Court Justices.

The trial court and the state appellate courts had the opportunity to address the issue of the admissibility of PAS under *Daubert*, but refused. As stated before, *Daubert* has been adopted by the Arkansas appellate courts. The trial court and the state appellate court had a duty under *Daubert* to conduct the applicable inquiry to determine whether PAS is not only relevant, but reliable. Thus, this Court should grant review of this matter and resolve the issue.

1. The trial court's and Arkansas Supreme Court's reliance on Parental Alienation Syndrome without its scientific acceptance in the community violates due process and *Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579 (1993)

The lack of acceptance of Parental Alienation Syndrome as a legitimate psychological theory and its exclusion from American Psychiatric Association's Diagnostic and Statistical Manual (DSM) was shown at trial. Parental Alienation Syndrome is the creature of Dr. Richard Gardner to describe his clinical impressions of cases he believed involved false allegations of child abuse. It was defined by Dr. Gardner as "a pathological medical syndrome manifested by a child's unjustifiable campaign of denigration against a parent that results from the programming (brainwashing) parent's indoctrinations and the child's contributions to the vilification of the target parent. Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, Children's Legal Rights Journal, Vol. 26, No. 1, page 2 (Spring 2006).

The American Psychiatric Association's Diagnostic and Statistical Manual (DSM) lists all recognized psychiatric syndromes. PAS is not included in the DSM. It is not recognized as a valid medical syndrome by the American Medical Association, the American Psychiatric Association, or the American Psychological Association. *Id.* at 5-6. In 1996, the American Psychological Association Presidential Task Force on Violence and the Family concluded there was no data supporting PAS despite the fact that several courts were using it to discount children's fears in hostile and psychologically abusive situations. *Presidential Task*

Force on Violence & the Family, Am. Psychol. Assoc., Violence and the Family, p. 40, note 108 (1996).

The only publication of PAS appears in non-peer reviewed journals or Dr. Gardner's own private publishing company. *People v. Fortin*, 184 Misc. 2d 10, 11 (N.Y. Co. Ct. 2000) Professor Jon R. Conte of the University of Washington Social Welfare Doctoral Faculty stated the Gardner's Sex Abuse Legitimacy Scale (SALS, the basis for Gardner's Parental Alienation Syndrome theory) is [p]robably the most unscientific piece of garbage I've seen in the field in all my time. To base social policy on something that flimsy as this is exceedingly dangerous." Debra Cassens Moss, *Abuse Scale*, 74 A.B.A.J., Dec. 1, 1998, at 26.

The lack of reliability of PAS is covered in detail in Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, Children's Legal Rights Journal, Vol. 26, No.1 (Spring 2006). The author first notes that PAS is not a medical syndrome. *Id.* at 6. Dr. Gardner even admits that PAS is a product of custody litigation and only exist "in countries that use an adversary legal system." *Id.* at 6.

One of the most disturbing factors of PAS is that it is targeted towards custodial mothers and attempts to limit the exercise of their legal rights. Some of the factors used by Dr. Gardner for the diagnosis of PAS are:

1. frequency of complaints to police and child protection services;
2. litigiousness;
3. success in manipulating the legal system to enhance the programming;
4. Risk of intensification of programming if granted primary custody.

Id. at 7. Mothers have a right to take action to protect their children from abusive fathers. PAS uses the exercise of this right for diagnosis. Interestingly, PAS focus solely upon the actions of the mother. The psychiatrist does not examine the father to determine whether any of the actions taken by the mother are justified.

Even when there is a diagnosis of PAS, there is no medical treatment. The treatment is either the legal threat of removal of the children from the mother's custody or the actual removal of custody. In the present case, the trial court took custody of children from Ms. Linder, terminated all of Ms. Linder's contact with the children, and placed her in jail for a year. While the actions of a court may deter further unacceptable behavior, it does not qualify as medical treatment.

PAS is defined by Dr. Gardner as "pathological and unjustified alienation." *Id.* at 8. When there is a justifiable cause for the alienation, then it is adaptive and not pathological. Thus, the alleged cause of the alienation must be examined. The problem is that there is never an assessment of the non-custodial parent to determine if there is justification for the alienation. The primary focus is on the custodial parent and the children. Without a complete examination of all the parties involved, it is impossible to determine whether the alienation is pathological or adaptive.

PAS is nothing more than the creature of Dr. Gardner in response to his perceived increase of false child abuse allegations in the 1980s. *Id.* at 19. In an attempt to distinguish between true and false allegations of sexual abuse, he created several tools including PAS. *Id.* at 19.

The mind set of Dr. Gardner when he created PAS is best summarized as follows:

> While Gardner vociferously denied that his work was sexist, he claimed that women project "their own sexual inclinations" onto their divorced husbands, fueling false sex abuse accusations and PAS, and are driven by the "'hell hath no fury like a woman scorned' phenomenon;" that divorced women seek female therapists who are themselves "antagonistic toward men;" that professional Child Advocates are primarily "overzealous women" who act "in the service of venting rage upon men;" and that "[f]ueling the program of vilification is the proverbial 'maternal instinct' . . . Throughout the animal kingdom mothers will literally fight to the death to safeguard their offspring and women today are still influenced by the same genetic programming." Throughout his PAS publications, Gardner portrayed women as paranoid, irrational, selfish, and psychopathic liars, and men as hapless, passive victims of unjustified female rage.

Id. at 19. Despite his claims, Dr. Gardner obviously had a problem with women.

Even more disturbing, Dr. Gardner expressed similar views as pro-pedophilia advocates and claimed that "adult-child sex is biologically natural, not inherently harmful to the child, and that any resultant harm is caused by social stigma rather than the sexual contact itself." *Id.* at 20. Clearly, Dr. Gardner was personally a mentally disturbed individual which might explain why he committed suicide.

2. There are due process implications in the trial court's and the Arkansas Supreme Court's refusal to follow its own Rules of Evidence

The Due Process Clause of the Fourteenth Amendment provides: [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . . Due process is meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Due process rules are shaped by the risk of error inherent in the truth-finding process. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976).

Arkansas has adopted Rule 702 of the Rules of Evidence to provide due process protection against the unlimited use of expert testimony. Similar to its federal counterpart, it states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This rule was designed to give guidance on the admissibility of expert testimony and prohibit the introduction of unreliable and irrelevant evidence. When the expert testimony lacks reliability it should not be admissible.

As previously noted, PAS lacks reliability and should not have been used by the trial court and the state appellate courts to justify a change of custody. Dr. Gardner's claim that he worked for Columbia University when he

was just a volunteer, coupled with the lack of empirical support for PAS is evidence of the lack of expert certification and admissibility. *Id.* at 17. One of the "fundamental requirements of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The rules of evidence was designed to insure that each party is heard in a meaningful manner. Any misapplication of a rule of evidence would therefore be a violation of due process.

II.

THE DUE PROCESS IMPLICATIONS OF THE RUBBER STAMPING OF THE FACTUAL FINDINGS OF THE TRIAL COURT BASED UPON THE PRETEXT OF A DEFERENCE TO THE SUPERIOR POSITION OF THE TRIAL COURT IS AN IMPORTANT QUESTION THAT NEEDS TO BE DECIDED BY THIS COURT.

In reaching its decision, the Arkansas Court of Appeals stated that it would "give due deference to the superior position of the trial court to view and judge the credibility of the witnesses. This was the standard previously applied to *de novo* review in Arkansas. It has also been applied by this Court. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In *Codd v. Velger*, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977), this Court explained:

> The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is

> usually in a superior position to appraise and weigh the evidence.

Id., 429 U.S. at 638. The problem is that the trial judge was not in a better position to judge the credibility of the key witness, Dr. DeYoub, since he testified by phone. Thus, there should be an exception to the deference given to the trial court.

A. The ruling of the Arkansas Supreme Court conflicts with prior holdings of this Court and should now be resolved by this Court

Basically, the Arkansas Supreme Court "rubber stamped" the trial court opinion since there is a factual issue involved in this child-custody cases. Under this approach, there could never be an appellate review of the sufficiency of the evidence in any child-custody cases since all involve the credibility of the witnesses to a certain degree. This was not the intent with the adoption of the doctrine of "due deference."

This Court has stated that it should not merely "rubber stamp" the findings below but should carefully review the evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951); *Gardner v. Florida*, 430 U.S. 349, 368 (1976). Since this Court does not condone the "rubber stamping" of the lower court's findings, the opinion by the Arkansas Supreme Court is in conflict with the prior rulings of this Court.

1. The Arkansas Supreme Court's unquestioned deference to the factual findings of the trial court as to the credibility of the witnesses violates due process when the key witness did not appear before the trial court

Credibility of witness are normally left to the discretion of the trial court, but can be made in the first instance by the state supreme court. *See, e.g., Cabana v. Bullock*, 474 U.S. 376 (1986). Issues of credibility are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-500 (1984). Where the trial court did not have the chance to observe the demeanor of the witness, there is no reason for the due deference as to the credibility of the witness.

The decision to change custody rests primarily upon the testimony of Dr. DeYoub. Where the testimony shows a questionable basis for the opinion of an expert, the issue becomes one of credibility for the fact finder, rather than a question of law. *Killian v. Hill*, 32 Ark. App. 25, 795 S.W.2d 369 (1990). At the same time, the credibility of such expert can be determined solely by examining the bases for his opinion without personally observing his demeanor on the witness stand. As stated before, Dr. DeYoub did not actually take the witness stand. Instead, he testified by telephone conference and the trial court was unable to observe his demeanor. Thus, the trial court was not in any better position than the appellate court to determine Dr. DeYoub's credibility.

Even assuming that "due deference" should be given to the trial court's judgment as to the issue of credibility,

the term "due deference" is not "absolute deference." Although, it is true that the trial court has the advantage of observing the witnesses while they testify, a certain amount of credibility can be determined by the actual testimony without personally observing the witness. An appellate court has the ability to review the record and ascertain whether a witness' testimony is credible to a certain extend based upon inconsistency therein. The court can also compare the testimony of the different witnesses to determine credibility. Thus, the mere fact that the trial court made a particular finding of fact based upon its determination of the credibility of the witnesses does not foreclose any and all appellate review.

Since a trial court's perception of the credibility of the witnesses is based upon not only the testimony, but also his personal observations, the trial court may not be in a better position to judge the issue of credibility. An individual's perception is subjective and can be influenced by factors beyond the person's control. For example, an individual may discredit a statement made by a person merely based upon his personal appearance or manner of dress. This does not imply that the individual is intentionally biased or prejudiced, it merely means he is human. As a human, he is influenced by his visual observations and his perception may be distorted based upon his personal life experiences. Thus, the appellate courts should refrain from giving unlimited deference to the findings of a trial court merely based upon the trial court's personal observation of the witnesses.

2. The Arkansas Supreme Court's unquestioned deference to the factual findings of the trial court as to the credibility of the witnesses violates due process when the trial court is bias.

There is no dispute that due process requires a "fair trial in a fair tribunal," *Withrow v. Larkin*, 421 U.S. 35 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-822 (1986); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). This Court stated in *In re Murchison*, 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."

Id., 349 U.S. at 136 (citations omitted). A litigant cannot receive a fair trial when the trial judge is bias and neither

can he/she receive a fair appeal when the appellate court defers to the findings of a biased trial judge.

The weight given to the trial court's decision is based upon the assumption that the court was acting in an impartial manner during the hearing. Following the presentation of Mr. Johnson's case, the trial court appeared to be determined to change custody merely upon the testimony of Dr. DeYoub without giving Ms. Linder the chance to present any evidence. (T. 1058) In addition, the trial court cross-examined seven of the eleven witnesses presented by Ms. Linder while he did not question any of the witnesses Mr. Johnson presented, including Dr. DeYoub upon whom the court relied to change custody.

In the trial court's cross-examination of Ms. Linder, it did not limit its questions to the custody issue but proceeds to question Ms. Linder about her objection to the case being transferred to the court after another judge was required to recuse. In fact, there is substantial testimony about Ms. Linder believing that the trial judge was a friend of prior judge and how her case effected the election. (T. 1749-1752) Clearly, this line of questioning had nothing to do with whether Ms. Linder should have custody of her children and shows that the trial court was not acting impartially.

Another example of the bias in the proceeding is the handling of the attorney ad litem. When Ms. Linder was forced to file a petition for certiorari in *Linder v. Weaver*, No. 05-1080, 2005 Ark. LEXIS 779 (December 5, 2005) to obtain her release from an unconstitutional sentence of one year for contempt issued by the trial court, the Arkansas Supreme Court indicated that "under the facts and

circumstances of this case, it would appear that the appointment of an attorney ad litem to represent the children's interest might be a benefit to all involved in this ongoing controversy . . . " What the Arkansas Supreme Court did not know was that on October 22, 2002, the trial court entered an order appointing Jerri Grady to act as Guardian ad litem for the minor children. (T. 362) While Ms. Grady fulfilled some of her duties as attorney ad litem and received payment as directed by the court (T. 364-397), she was dismissed on September 16, 2004 prior to this matter being heard by the court. (T. 396)

Prior to trial, Ms. Linder received a copy of the report prepared by Ms. Grady and noticed that there were discrepancies regarding Ms. Grady's meeting with Ms. Linder. The report implies that Ms. Grady meet with Ms. Linder on two occasions. (T. 490-491) Ms. Linder testified at the hearing that she only talked to Ms. Grady for five minutes in the hallway after Ms. Grady had interviewed Sky and Sky was hysterical. (T. 1600-1601) This was not any real meeting as implied by the report.

Ms. Linder questioned whether Ms. Grady met the standards set forth in Section 5 of Administrative Order No. 15 of the Arkansas Supreme Court, especially with the requirement of (a) which requires the attorney ad litem to interview all the parties. In order to prepare for trial, Jennifer Linder had subpoenas duces tecum served on Jerri Grady requiring her to appear at deposition and at the hearing with all documents relevant to this action. (T. 484-487) Jerri Grady filed a motion to quash the subpoenas (T. 478) and despite Jennifer Linder's objection (T. 470), the trial court entered an order quashing the subpoenas. (T. 476)

The actions of the trial court in refusing to allow Ms. Linder the opportunity to question Ms. Grady about her report clearly indicates that the trial court was not acting impartial. In fact, Deron Johnson attempted to introduce the report of the attorney ad litem at the beginning of the hearing. (T. 595) Ms. Linder objected to the report as being hearsay and raised the issue of the trial court's quashing the subpoenas. (T. 595) At that time, the trial court took the matter under advisement. (T. 600) Later in the proceeding, the trial court admitted to the report (T. 641-643), only to have the report withdrawn by Deron Johnson. (T. 1056).

The Arkansas Court of Appeals refused to address the issue of the trial judge's bias based upon Ms. Linder's failure to request that he recuse from the case. The Court ignored the fact that the issue was raised in the context of the deference given to the trial court's findings of fact. The Arkansas Supreme Court refused to grant review of the matter, although there were three justices that would have granted review. This matter had already been placed before the Arkansas Supreme Court in the form of a petition for certiorari in *Linder v. Weaver*, No. 05-1080, 2005 Ark. LEXIS 779 (December 5, 2005). In that case, the Supreme Court reversed the trial court's finding that Ms. Linder should be placed in custody for a period of one year for contempt of court. The wrongful incarceration of Ms. Linder by the trial judge while she sought relief from the Arkansas Supreme Court was most likely on the minds of the justices who would have granted review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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2006 WL 3425021

JENNIFER LINDER (JOHNSON), APPELLANT v. DERON JOHNSON, APPELLEE

CA 06-033

COURT OF APPEALS OF ARKANSAS, DIVISION TWO

November 29, 2006, Decided

NOTICE: NOT DESIGNATED FOR PUBLICATION. PLEASE REFER TO THE ARKANSAS RULES OF COURT.

OPINION:

Jennifer Linder, formerly Jennifer Johnson, appeals from an order changing custody of her two children to their father, appellee Deron Johnson, and temporarily prohibiting her from having contact with her children. She claims that the change of custody was not in the children's best interests, challenges the conclusions of the expert witness who recommended that custody be changed, and asserts that the trial judge was biased. We affirm that portion of the trial court's order changing custody to Deron; modify that portion of the order concerning Jennifer's visitation; and remand for the trial court to prescribe supervised visitation for Jennifer.

I. Factual Background

The parties in this case were divorced on December 23, 1998, and Jennifer was awarded custody of their two children: Keith Johnson, d.o.b. 10/25/91, and Sky Johnson, d.o.b. 10/21/93. Pursuant to the divorce decree, Deron was awarded standard visitation. After the divorce, an extensive

series of motions and counter-motions were filed by the parties that culminated in the instant appeal.[1] Although this appeal is based solely on the order changing custody, it is helpful to review the relevant pleadings filed by the parties that led to the order.

Approximately one month after the divorce, on January 24, 1999, Deron filed a motion to modify the divorce decree and requested family psychological counseling. He alleged that Jennifer moved from Cleburne County without prior notification and that she failed to comply with that portion of the divorce decree ordering her to exchange meaningful information with him regarding the children and to keep him timely apprised of their daily activities. He objected to the move on the basis that he would not be able to exercise his mid-week visitation. He also requested psychological counseling because Keith, then eight years old, was displaying severe behavioral problems, such as physically attacking Deron, telling Deron that he was not Keith's father, and accusing Deron of stealing his toys and his dog. Deron's motion alleged similar behavior from Sky; stated that both children screamed and cried when he attempted to pick them up for visitation; and asserted that Sky's behavior was strongly suggestive of coaching. Deron voluntarily dismissed this motion on November 8, 2001.

Beginning in September 2001, Jennifer and the children began receiving psychological counseling from Dr.

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[1] This is the second appeal in this case. Previously, Jennifer successfully challenged the trial court's ruling (in the same order upon which the current appeal is based) that she was in contempt of the court's prior orders because she deliberately interfered with Deron's visitation. *See Linder v. Weaver*, 364 Ark. 319, ___ S.W.3d ___, 2005 Ark. LEXIS 779 (2005).

Bethel Thomas. The purpose of these visits was to help the children cope with their fear of visitation. These sessions continued into 2003. A FINS petition was filed by Susan Miles, a social worker who was counseling Deron, but the petition was later dismissed.

On December 28, 2001, Deron filed another petition. That petition requested a change in visitation, requested that Jennifer be held in contempt, and asserted that Jennifer had "systematically 'poisoned' the children's minds with unreasonable fears and erroneous information about" him. He later filed an amended petition requesting a change of custody. Jennifer responded with a petition to modify custody, which alleged that Deron's lack of parenting skills and actions toward the children had "engendered such fear that the children are afraid of him; and that his visitation should be curtailed and should be supervised by a mental health facilitator."

Deron's dismissal of his second petition was reflected in an order of continuance that was entered on October 22, 2002. In this order, the trial court ordered the parties to participate in counseling with a person other than the children's current therapist, Dr. Thomas, or Deron's therapist, Sheldon Rappapport. The court further ordered all parties to cooperate with and to follow the counselor's recommendations. In addition, the court appointed Jerry Grady as the guardian ad litem for the children. The court indicated that the matter would be set for a final hearing upon notice of the parties or the ad litem.

Grady interviewed the children but spoke only briefly with Jennifer. Grady provided a copy of her report to the court and to the attorneys of record, in which she recommended continued, gradual visitation with Deron. Grady

was discharged from the case on September 16, 2004. Jennifer subpoenaed Grady to appear at the hearing, but Grady filed a motion to quash the subpoena, based on attorney-client privilege. The court agreed and quashed the subpoena; Grady's report was ultimately withdrawn by Deron and thus, was not relied upon by the trial court.

An attorney was retained for the children but the trial court did not allow her to participate in the proceedings. Jennifer thereafter filed a complaint against Judge Norman Harkey, the trial judge, and the case was transferred to Judge Tim Weaver, over Jennifer's objection, on September 15, 2004.[2]

Deron filed a petition for contempt on November 18, 2004. That petition alleged that Jennifer moved the children to Florida without prior consent of the court and without prior notification to him. He also alleged that Jennifer's "conduct is willful and malicious. She has engaged in the pattern and practice of continually alienating [Deron] from his children. This pattern of behavior has continued throughout the parties' divorce and throughout this proceeding." He requested that Jennifer be incarcerated for her conduct.

Jennifer responded with a counter-petition for contempt and modification. She requested that Deron be found in contempt for failure to pay child support and that his child-support obligation be increased.

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[2] Judge Weaver explained in a letter to the parties that the domestic-relations cases in Cleburne County were divided between him and Judge Harkey. Therefore, if Judge Harkey recused, Judge Weaver was the only judge left in that county authorized to hear a domestic-relations case.

Before a hearing was conducted on those motions, the court ordered Deron, Jennifer, and both children to undergo psychological testing with a court-appointed psychologist, Dr. Paul DeYoub. Dr. DeYoub submitted to the court a report on his evaluations of all of the parties and recommended that custody be changed to Deron, with supervised visitation for Jennifer. In contrast, Dr. Thomas, who saw the family for a two-year period beginning September 2001, recommended that custody be retained in Jennifer, with supervised visitation for Deron.

The hearings on the parties' motions were held on September 16, 2005, and September 20-24, 2005. The trial court relied heavily on Dr. DeYoub's conclusion that Jennifer made the children believe that Deron had abused them, thus systematically alienating the children from Deron. Immediately following the hearing, the trial court entered a hand-written order that transferred custody of the children to Deron and required the children to be transported to Methodist Behavioral Hospital for immediate assessment and in-patient care.

Another order was entered on October 5, 2005, in which the court determined that Jennifer had "willfully and wantonly refused to comply with visitation," and had "engaged in a protracted campaign to alienate the children from [Deron] and to inculcate a hatred of [Deron] in the minds of the minor children." The court further found that Jennifer interfered with Deron's visitation by failing to communicate with him regarding visitation, by refusing visitation, and by asking him not to attend the children's extra-curricular activities.

The court subsequently submitted a written order, stating that it was in the children's best interest to have

custody immediately transferred to Deron; it again ordered the children to remain in the Methodist Behavioral Hospital and to be placed in Deron's custody upon their release. The court also found both Jennifer and Deron in contempt, but determined that Deron had purged himself of contempt by paying his delinquent child support. However, the court ordered Jennifer to be incarcerated for one year, in part, for her "sustained campaign of alienating the children." The court further specified that after one year, Jennifer could petition for supervised visitation. Jennifer previously successfully challenged the contempt finding; thus, she now appeals solely from that portion of the trial court's order changing custody of the children and limiting her to supervised visitation.

II. Change of Custody

Jennifer argues that the change of custody was not in the children's best interests primarily by attacking the acceptability of Dr. DeYoub's diagnosis of Parental Alienation Syndrome and by comparing Dr. DeYoub's conclusions with Dr. Thomas's conclusions. Relatedly, she argues that the move to Florida was in the children's best interest. Finally, she asserts that the trial judge was biased.

In reviewing a change of custody, we consider the evidence *de novo,* but will not reverse a trial judge's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Inmon v. Heinley,* 94 Ark. App. 40, ___ S.W.3d ___, 2006 Ark. App. LEXIS 71 (2006). We give due deference to the superior position of the trial court to view and judge the credibility of the witnesses. *Id.* This deference to the trial court is even greater in cases involving child custody, as a heavier

burden is placed on the trial judge to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Id.* Our law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Id.*

A judicial award of custody should not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the child, or when there is a showing of facts affecting the best interest of the child that were either not presented to the trial court or were not known by the trial court at the time the original custody order was entered. *Id.* Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Id.*

We affirm that portion of the trial court's order changing custody to Deron, but modify that portion of the order pertaining to visitation and remand for the trial court to prescribe supervised visitation for Jennifer. We address Jennifer's first two arguments together and hold that, on the record before us, the trial court was amply justified in granting Deron's motion to change custody, based on Dr. DeYoub's findings and other testimony. The cumulative evidence demonstrates that Jennifer engaged in an unjustified, deliberate, pervasive pattern of conduct aimed at alienating her children from their father and that her conduct had the intended effect. As such, the trial judge was justified in concluding that the move to Florida was not in the children's best interests but was merely part of Jennifer's scheme to deprive Deron of visitation and to further alienate the children from him. The trial judge was

also justified in ordering the children to be immediately transported to the Methodist Behavioral Hospital and to prohibit Jennifer, at that point, from having contact with her children. Finally, we do not consider Jennifer's bias argument because it was not raised below.

The testimony in this case is voluminous and, in many respects, is what one would ordinarily expect to hear in a child-custody case. Each parent remarried. Jennifer married Billy Cockrill in August 1999 but they apparently divorced in late 2000. Deron married his current wife, Amber, in March 2001; her son, Preston, who is two years younger than Sky, and their son, Landon, born in June 2001, also lives with them.

Each side presented evidence that each parent was a fit parent, loved the children, was financially able to provide for the children, etc. Jennifer presented testimony to establish that she did not interfere with visitation and, to the contrary, that she encouraged visitation, but that Deron did not attempt to regularly exercise visitation. Deron presented contrary evidence that he attempted to exercise visitation, but was thwarted because Jennifer was difficult to contact, consistently asserted that she or the children had scheduling conflicts with the visitation, and moved out of the county and even out of state without informing Deron.

Nonetheless, this case is unusual in that the facts present what seems to be a Hobson's choice for the trial court: either the children have been abused by their father or their mother has convinced the children that they have been abused by their father. The abuse that Jennifer alleged can be summarized as follows:

1) Deron whipped the children with a "spiked ping-pong paddle";

2) Deron's mother locked the children out of her house for hours during the rain, causing the children to be covered in ticks, which were not properly removed;

3) The children were not fed while in Deron's or his parents' care;

4) The children were placed in time out for excessive periods of time; Sky was placed in time-out so long that she urinated on herself;

5) According to their "punishment chart," the children were spanked "six times" for refusing to call Deron "dad";

6) Deron grabbed Keith by the ear so hard that it left "a hole" in Keith's ear;

7) Deron's wife, Amber, struck Keith in the face with her cell phone;

8) Deron and his parents threatened to have the children locked up in a mental hospital;

9) Amber's six-year old son, Preston, attempted to touch Sky under her clothes, but Deron and Amber did not attempt to stop him; Keith stopped him and was punished for it; and

10) During one visitation exchange, Deron brought along a social worker, Susan Miles, who got into the car with the children and attempted to "deprogram" the children by chanting things like, "Johnson, Johnson, your name is Johnson" and "Deron is your father"; the children were told their mother was going to jail; Deron forcibly removed the children from the car and carried

> them to his parents's house; and the children were physically restrained during the entire two-hour visit to prevent them from leaving, which left bruises and red marks on them.

Not only was abuse alleged by Jennifer, but it was also alleged by the children, who testified against their father. Nonetheless, this case simply turns on the credibility of the witnesses and whether the trial court erred in relying on Dr. DeYoub's conclusions instead of Dr. Thomas's. We hold that the trial court did not err in relying on Dr. DeYoub's conclusions.

A. Dr. DeYoub's Recommendation

Dr. DeYoub met with Deron three times, for a total of six hours; met with Jennifer two times, for a total of eight hours; met with Keith one time, for a total of two hours; met with Sky one time, for a total of two hours; and met with Deron's wife one time, for a total of one-and-one-half hours. These totals do not include the time spent conducting diagnostic evaluations. Although Dr. DeYoub met with the parties for a briefer period than Dr. Thomas did, the statements to Dr. DeYoub made by the children and Jennifer support his conclusion that Jennifer deliberately and successfully alienated her children from Deron. Based on those statements, Dr. DeYoub concluded that this case was "an egregious" case of parental alienation.[3]

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[3] Much of the testimony and much of the parties' arguments are devoted to establishing or discrediting Dr. DeYoub's theory of Parental Alienation Syndrome. We do not address the acceptability of this theory as a diagnostic theory. Nor do we base our decision on Dr. DeYoub's conclusion that the children were alienated from their father based on this theory. Rather, we are convinced that Dr. DeYoub's conclusions

(Continued on following page)

Because Dr. DeYoub concluded that Jennifer projected her sense of rejection onto the children "from the minute the marriage ended," it is helpful to examine the circumstances of the parties' separation. Keith was six and Sky was four when the parties separated. Unsurprisingly, Jennifer and Deron gave different versions of why they separated. Deron testified that he was feeling stressed and wanted to go for a drive. He told Jennifer that he would be back in a while; she told him to be back in thirty minutes. Deron said that when he returned an hour later, Jennifer met him at the front door; informed him that he had not returned in thirty minutes as she had insisted, and told him, in front of the children, that he could find another place to live. Deron said the children were beating on the front door, crying and yelling, and wanted out.

Jennifer, on the other hand, said that she and Deron had just returned from their overnight, second honeymoon after renewing their wedding vows, and that Deron went to the airport for a flying lesson. She was upset because she felt he should want to spend time with the children after being apart from them for one day. According to her, Deron did not return home and did not call until four days later. She said that she begged him to come home and did not lock him out. However, Keith offered yet another version of the story – he said that Jennifer told the children they were divorcing because Deron had an affair with the children's babysitter.

There is clear and convincing evidence that Jennifer attempted to thwart visitation and keep the children from

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regarding the parties' behavior are consistent with the statements the parties gave to Dr. DeYoub and the testimony offered at the hearings.

their father beginning with the children's first visit following the separation. Dr. DeYoub found it "critical" that Jennifer was unable to explain why the children resisted visitation from the *first* visit with Deron, which, according to Jennifer, was preceded by the children screaming so loudly that the neighbors wondered whether to call the police. This is quite telling in light of the fact that Jennifer admitted Deron had a good relationship with Keith during the parties' marriage; that she did not specifically allege that any abuse took place during the marriage; and, in fact, did not specifically allege child abuse in her pleadings until August 2005, in her responses to Deron's motion for contempt.

As Dr. DeYoub noted, it is normal for any child with separated parents to have mixed feelings about visiting the noncustodial parent. However, even if Deron, in theory, began abusing the children at the earliest opportunity – *during the first visit* – there would be no apparent reason for the children to be intensely predisposed against seeing him on the *exchange for that visit* – except that, according to Deron, on the first visit, the children told him that Jennifer had told them he would kidnap them and would not bring them back; and that he would take their toys and their clothes.

Deron told Dr. DeYoub that the visitations themselves were "pretty normal" but that the exchanges continually worsened, as it would take longer and longer to convince the children to come with him. The children would refuse, would cry, would tell him they hated him, and sometimes, would hit him. He maintained that Jennifer never encouraged visitation and refused to correct the children's behavior during the exchanges. During the last visit in November 2004 (after the children moved to Florida),

Deron said that the children "had a stone cold face" and were disengaged and negative. After approximately fifteen minutes, Keith called Jennifer to come get them. Dr. DeYoub concluded that "everything regarding the children's demeanor Mr. Johnson reports is credible because I have seen the children, and know that these reports are consistent with their psychological functioning."

Deron testified that Jennifer was difficult to contact; that she consistently alleged scheduling conflicts; and that she moved out of county and out of state without notifying him. After the children moved to Florida, Deron's telephone calls went unanswered; he did not know where the children were and did not see them for nearly one year. Deron also related an incident that took place during earlier visitation in which Sky wanted to spend an extra weekend with him, but when he asked Jennifer about it, she raised her voice to Sky, demanding, "Do you want to see your dad?" Sky's response was to hold her head down; Jennifer responded, "I told you."

Deron told Dr. DeYoub that visitation reached a "pivotal point" after his son, Landon, was born in June 2001. At this point, Keith was almost ten and Sky was nearly eight. By September 2001, Jennifer had openly stated (as she admitted to Dr. DeYoub) that she was not going to make the children see Deron anymore.

In addition, Jennifer admitted that she told the children's school not to call Deron in case of an emergency and that she told Deron not to come to school. She also told Dr. DeYoub that *the children* chose to call Deron by his name, instead of "dad," and that *the children* made that choice independently, *at ages four and six,* when their parents separated. Dr. DeYoub noted that Jennifer "seems

to think it is perfectly natural for them to make a decision like that." The children also used the name "Linder" at school, instead of "Johnson." Jennifer insisted that she discouraged the children from informally changing their name from Johnson to Linder; yet, Keith told Dr. DeYoub that, approximately one month after the separation, Jennifer told him she would not discipline him for not calling Deron "dad."

The statements Keith and Sky made to Dr. DeYoub also support that Jennifer alienated them from their father. The children were interviewed by Dr. DeYoub on September 7, 2005; the last time they had seen Deron was in November 2004, for the fifteen-minute visitation previously noted. Keith was nearly fourteen years old when his evaluation was conducted; Sky was nearly twelve. Each child expressed the desire to have no further contact with their father, expressed unequivocal animosity toward Amber and Deron's parents, and expressed no interest in seeing Landon, their half-brother (who was four years old at the time of Dr. DeYoub's assessment).

Referring to Deron getting custody, Keith began the interview with Dr. DeYoub by saying, "I'm hoping he doesn't get it with all my heart." Keith described Deron as having no feelings or emotions for anyone; he believed that Deron feels he can do anything to anyone. Keith also said that Deron cannot think for himself and that Deron's parents are "calling the shots." He also said that Deron could kill someone and not worry about it. Keith stated that Deron is "killing" Keith's maternal grandparents with the custody case. Keith said that he would rather be in a mental hospital or foster care than in Deron's custody.

Dr. DeYoub described Sky as tearful and emotional during her interview. Sky corrected the doctor when he referred to Deron as "her father," stating that she would rather call him "Deron." She said that she and Keith begged her mother to move to Florida and that she felt "normal" in Florida because she did not have to worry about visitation. She said that during the Miles incident, Miles slapped her and that while her grandfather held her, she screamed so much that her throat bled; however, neither of these allegations were reported to the police.

Sky said that she and Keith had to convince Jennifer that they were being abused; and that Jennifer called the Arkansas Department of Human Services (ADHS) and the child-abuse hotline but received no response. Sky told Dr. DeYoub that she did not want to go to her father's wedding, but she had to go because he got a court order. She told Dr. DeYoub that the "happy" pictures taken while in Deron's custody are fake; she testified that she and Keith were often whipped before pictures were taken to assure that they appeared to be happy. Sky also said that Amber encouraged Deron to whip them.

Like Keith, Sky maintained that Jennifer never obstructed visitation. When Dr. DeYoub asked Jennifer if she moved to Florida to avoid the court case, she did not deny it, but justified the move by stating that all of Cleburne County was against her.[4] Keith reported to Dr.

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[4] Jennifer maintains that there is a conspiracy in Cleburne County against her involving Judge Harkey, Judge Weaver, the police department, Susan Miles, Jerry Grady, and even Jennifer's former attorney. Dr. DeYoub noted that not only do the children recite "chapter and verse" the abuse allegations but they are also well-versed in Jennifer's conspiracy theory.

DeYoub that they decided to moved to Florida "after the last court" and that Jennifer's lawyer told her to look for a job in Florida. While Jennifer testified at trial that she was unsure of the visitation requirements while she was in Florida, her second husband, Cockrill, testified that Jennifer was in touch with her lawyer while she lived in Florida and that her lawyer advised her to arrange visitation and warned her that she would be in trouble with the court if she did not. Remarkably, both children indicated that they would not have talked to Deron on the phone if he had called them while they were in Florida.

Both children expressed fear for their lives and threatened to run away if Deron was awarded custody. Dr. DeYoub, while recognizing that Deron was not a perfect parent, found the allegations of abuse to be "preposterous." He did not discount the children's threats of running away but noted that if they did so, then Deron would be required to seek help for them.

Dr. DeYoub further explained that the children saw no redeeming characteristics in Deron or his family. The doctor found the children's complete animosity and lack of ambivalence toward their father as "unnatural, if not absurd." Although belied by the children's testimony at trial and the photographs admitted into evidence, the children expressed to Dr. DeYoub that they never had any good times while in Deron's custody and that they desired to have absolutely no contact with Deron or his family, including their own half-brother, Landon. Dr. DeYoub stated that the children's lack of interest in their own brother (who is completely blameless) is another example of how the children have been alienated from their father.

The doctor also observed that "[b]oth children assert with great pride that their decision to reject [Deron] is their decision alone." Dr. DeYoub further stated in his report that "The three, both children and the mother, use the same language and scenarios reflecting the same terminology that they all have in common . . . [t]he mother and children do not respond to reason." For example, Keith asserted, as did Jennifer, that Deron's father-in-law, a deputy sheriff, was unfairly involved in the case; that Judge Harkey had appointed his "best friend," Judge Weaver; and that the ad litem was unfair and named Jennifer as an abuser (which the ad litem did not do). Dr. DeYoub felt that Keith's statement that Deron's parents are calling the shots were "adult statements from his mother." He also noted that in remarking about Deron's father-in-law, Keith "did not miss a beat in relating everything his mother did."

Dr. DeYoub reviewed the transcript of a secret audiotape of the children's visit with Deron and his parents made by Sky and concluded that the children were highly disrespectful of Deron, Amber, and Deron's parents.[5] Dr. DeYoub noted:

> The father and the grandfather, in spite of the mother's own account of this incident, were in my view, making every reasonable attempt to convince the children they loved them and they wanted to visit with them and even live with them. It is true they accused the father of abusing them, but the father has reason to believe that the mother is coercing the children against the visitation. *The transcript shows the children*

[5] We did not find this audiotape or transcript in the record.

> *to be completely irrational regarding the visitation and the reason for their refusal. Yet, the mother thinks the children are engaging in rational thought and she is harming them by her refusal to over the last seven years to challenge their erroneous thinking. . . . She is paranoid, she believes everyone is against her, she files charges against everyone who challenges her, and she is a covert aggressive who portrays herself as victimized and misunderstood along with her children. . . .*

(Emphasis added.)

With regard to the children being coached, DeYoub noted that:

> [*T*]*he children* cite chapter and verse consistent with the mother's allegation, children who were 4 and 6 years of age at the time the separation occurred, *who apparently are demonstrating incredible memories beyond what any child this age is developmentally capable of. The reason they have such a photographic memory for these events is that they are not remembering the event itself, but countless replays and rehashing of exaggerated trauma.*

(Emphasis added.) The doctor further stated that the children "are both extremely protective of their mother to the point of pathology. She does no wrong and when I asked these children how they are disciplined by their mother, they said they are not."

Dr. DeYoub concluded that Jennifer "has very significant histrionic, narcissistic, and paranoid personality traits"; that she is ready to "see herself" as a martyr because she indicated to the doctor several times that she

would not cooperate with forced visitation, even if the court ordered it. He said that Jennifer denies any responsibility for the problems in the marriage, divorce, or the problems that arose subsequent to the divorce. Dr. DeYoub said that

> [s]he sees herself as flawless, a victim of her ex-spouse, and with a more mature defensive structure, she would see her history in this marriage as a more reasonable way with less need to deny any responsibility. . . . She sees her decision not to require her children to have visitation as a virtue, rather than a disorder. *She has absolutely no insight, and I mean zero, regarding her contribution to this problem. She thinks the only mistake she ever made was supporting the visitation.*

(Emphasis added.)

Deron's diagnostic scores indicated to Dr. DeYoub that Deron was less defensive, more forthright, and overall, that he did not project any significant emotional problems. Dr. DeYoub found Amber to be an honest woman and he did not believe that she was abusive toward the children. Dr. DeYoub recommended that custody be changed to Deron, with supervised visitation for Jennifer.

B. Dr. Thomas's Recommendation

Dr. Thomas met with the various family members over a two-year period, beginning in September 2001. In sharp contrast to Dr. DeYoub, he believed the children's allegations of physical and psychological abuse and did not believe the children were coached; he did acknowledge that the children's descriptions of the abuse, such as the spiked ping-pong paddle and Deron causing a hole in

Keith's ear, may have been exaggerated. Dr. Thomas stated that the threat the children felt from their father "was very real to them" and that it would take a "very intentional, conscious, systematic effort at reducing that fear."

Dr. Thomas admitted that his purpose in meeting with the family was not to make a clinical judgment about Jennifer and that he did not diagnose her. He testified that the purpose of his visits was to help the children cope with their fear of visitation. He also testified that he was baffled by the fact that the children had been frightened from the early visitation phase. In contrast to the entire family's testimony, Dr. Thomas did not believe that the children's negative and fearful attitude manifested until the *second* visitation, during which the allegations were made that the children were locked out of their grandparents' house. His impression was that Jennifer had encouraged visitation and had reacted as any parent would "who has been fighting for her children." He believed that the children's protection of Jennifer was normal but did not feel that their "all or nothing" attitude toward their father was unusual.

Dr. Thomas read Dr. DeYoub's report. He was "shocked" that Dr. DeYoub had reached the conclusions that he had reached after meeting with them for such a limited time. Dr. Thomas felt that Dr. DeYoub was "biased against the expression of the children and the mother" and was too quick to label the situation as one involving parental alienation syndrome, which, in Dr. Thomas's opinion, is not a "recognized diagnostic syndrome." He recommended that the children remain in Jennifer's custody with "reasonable visitation" for Deron, if such visitation could be accomplished in such a way that it

would not traumatize the children. He flatly stated that changing custody to Deron "would be the worse thing that could happen for the children."

C. Analysis

We hold that the trial court did not err in relying on Dr. DeYoub's opinion rather than Dr. Thomas's. Although Dr. DeYoub spent considerably less time with Jennifer and her children, unlike Dr. Thomas, Dr. DeYoub did interview Jennifer and perform diagnostic tests on her with the intent of diagnosing Jennifer and the children. Further, the statements of Jennifer and her children to Dr. DeYoub support Dr. DeYoub's conclusion that Jennifer alienated the children from Deron from the first visitation. The evidence supports that the children's allegations match the mother's allegations because the children have been coached by their mother. The children's telling testimony at the hearing was essentially consistent with the statements they made to Dr. DeYoub. However, at the hearing, Jennifer largely denied that she made similar statements to DeYoub or asserted that he misrepresented what she said – presumably because her statements to him amply demonstrate how she alienated her children from their father.

Further, to reverse based on Jennifer's allegations would require us to believe what the trial judge did not believe – that Jennifer encouraged visitation despite the children's allegations of abuse and that she reported the abuse but that the police and ADHS were unresponsive because of the conspiracy against her in Cleburne County. Jennifer stated that she could not "blow off" that her children were being abused, yet she insisted that she had

an "open-door" policy and that Deron could come get the children at any time and take them anywhere they wanted to go, except to his home. The existence of such an "open-door policy" defies belief where the mother also maintains that her ex-spouse is horrifically abusing the children.

Dr. Thomas, too, recognized that something "systematic" was being worked on the children, although he believed the source to be Deron, and not Jennifer. He stated: "It was a systematic . . . breaking of trust with the children, systematic uncertainty, a systematic sort of punishing response as opposed to what I would consider a loving and caring response."

Yet, even Dr. Thomas believed that, despite the children's descriptions of visitation, they had positive experiences with their father. Dr. Thomas recognized that the children were reluctant to show a lot of excitement about anything that happened with Deron, "because they felt like it would be used against them" – more evidence that the children had been coerced into denying that they wanted visitation with their father.

To be sure, Deron and his parents have not acted in an exemplary manner. Regrettably, the "deprogramming incident" did occur; the parties differ with regard to their opinion as to the nature of the conduct involved and the degree to which the children were harmed.[6] Nonetheless,

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[6] Jennifer and the children testified that, during this incident, at Miles's continual direction, Deron forcibly removed the children from the car and that he and his father physically restrained them by holding them in their laps during the two-hour visitation to keep the children from running away. This testimony contradicts the children's other assertions that they were taken from room to room and told things like, "this is your room, this is your home." The investigating

(Continued on following page)

even this incident supports that the children were coached into exaggerating or lying about actual events.

After the incident, Jennifer contacted Mark Holland, a Highway Patrol Officer whom she knew, because she had telephoned the Cleburne County Sheriff's Department before and felt that their response had been unsatisfactory. It is notable that Officer Holland, a twelve-year police veteran whom Jennifer trusted enough to call, expressly testified that he believed that the children were coached. He thought it was "unusual" because when he would ask them a question, "they would go into their thought process, thinking about what to answer to me, their faces would literally contort, as if they're just really thinking about what they need to say, or what to say." Officer Holland said that when he asked Sky a question, she looked to Keith "as if for guidance." He characterized the children's behavior as "strange"; said that they told him things he knew to be "untrue" or "totally ridiculous," and said that they became "agitated" at the mention of Deron's name.

While this incident is inexcusable and probably frightened the children, there was no evidence that they suffered lasting harm. Rather, it appears to be an isolated incident which, absent additional credible evidence, does not support reversal. To the contrary, the testimony of the officer supports that, as with the other allegations of

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officer indicated that the children had red marks and bruising on their bodies, which he described as not "aggressive" and that he rated as a "2" on a scale of "10." The mild bruising was apparently the result of the children resisting when their father tried to remove them from the vehicle and being restrained during the visitation.

abuse, the children were coached into fabricating allegations or exaggerating the actual events.

On these facts, we agree that custody should be changed to the father. Dr. DeYoub determined that Jennifer completely alienated Sky and Keith from Deron; that custody should be changed to Deron; and that Jennifer should have supervised visitation. He based his conclusion, in part, on research showing that children who had been completely alienated from their parents tend to remain completely alienated unless their access to the restricting parent is reduced or eliminated. Thus, the trial court was justified in changing custody to Deron, the alienated parent, and in temporarily restricting the children's access to Jennifer, the parent who caused the alienation. The trial court was not required to ignore Dr. DeYoub's report, the harm Jennifer has inflicted on her children, Jennifer's express intent to continue to violate the trial court's orders, and her skewed view of the events in this case. Accordingly, we affirm that portion of the trial court's order changing custody to Deron.

However, because of the time that has elapsed since the trial court's order has been entered, we modify that portion of the trial court's order relating to visitation and instruct the trial court on remand to prescribe supervised visitation for Jennifer. In so doing, we encourage the trial court to condition the mother's right to supervised visitation on evidence that she is actively engaged in psychological counseling and is demonstrating that she is not continuing in her paranoid tendencies that produced the ill effects in this case. We leave it to the trial court's discretion to determine whether to award Jennifer unsupervised visitation at some future point.

Finally, we readily dismiss Jennifer's argument that the trial judge, Judge Weaver, was biased. Jennifer admits that she is not questioning whether Judge Weaver should have recused from the case but maintains that she is attempting to show that his evaluation of the credibility of the witnesses was impaired, as demonstrated by the manner in which he questioned her witnesses, and by the fact that he quashed the subpoena for Grady, the ad litem. Regardless, Jennifer did not below assert that Judge Weaver questioned the witnesses in a biased manner or otherwise handled the case in a biased manner. Therefore, she is now precluded from making such an argument for the first time on appeal.[7]

Affirmed in part; modified in part; remanded in part.

GLOVER, J., agrees.

PITTMAN, C.J., concurs without opinion.

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[7] Jennifer's assertion that the Judge Weaver is biased because he was prepared to change custody before she presented her case evinces her lack of understanding of evidentiary procedure, rather than bias on the part of the trial judge. Judge Weaver denied her motion to dismiss, which was necessarily filed *before* Jennifer presented her evidence, merely stating that DeYoub's testimony demonstrated a change of circumstances. He thereafter considered her evidence before determining whether the change of circumstances warranted a change of custody. Further, any arguments that Judge Weaver exhibited bias in not allowing Jennifer to question the ad litem is also without merit because the ad litem's report was withdrawn by Deron and thus, was not part of the evidence in this case. Finally, our review of the record reveals that there was nothing improper in the manner in which Judge Weaver questioned the witnesses.

IN THE CIRCUIT COURT OF
CLEBURNE COUNTY, ARKANSAS
DOMESTIC RELATIONS

JENNIFER LINDER (JOHNSON) PLAINTIFF

VS. NO. E 1998-133-4

DERON JOHNSON DEFENDANT

ORDER

(Filed Oct. 5, 2005)

On this 24th day of September, 2005 appeared the Plaintiff Jennifer Linder by and through counsel Lisa Jones-Ables and the Defendant Deron Johnson by and through his counsel Holly Meyer the parties having appeared for a hearing on September 16, 20, 21, 22, 23, 24 on all pending petitions and motions of the parties. Upon proper notice to both parties, upon statements of counsel, upon oral testimony in open court, upon exhibits introduced into evidence and on the record as a whole, from all of which the Court finds as follows.

1. This Court has jurisdiction over the parties and the subject matter.

ORDERS OF THE COURT

2. The parties were divorced by this Court on December 23, 1998 and entered as a matter of record on December 23, 1998. The decree of divorce provides in part as follows.

> " . . . Plaintiff is the proper person to have custody of the parties' minor children with the Defendant having open and liberal visitation. If a disagreement regarding visitation should arise,

specific visitation for the Defendant will be as follows:

(A) *Weekend Visitation.* Every other weekend from 5:00 p.m. on Friday to 5:00 p.m. on Sunday.

(B) *Weekday Visitation.* Husband will be entitled to visitation one evening during the school week from the time school lets out until 7:00 p.m. The day will be determined by the parents.

(C) *Christmas Holidays.* The Christmas school holiday shall be divided equally with the Custodial parent having the children on Christmas day in even numbered years and the Husband having the children on Christmas day in odd numbered years.

(D) *Thanksgiving.* Custodial parent is to have the children during Thanksgiving break during odd numbered years and Husband is to have the children during Thanksgiving break during even numbered years beginning at 6:00 p.m. on the Wednesday before Thanksgiving and ending at 4:00 p.m. on the following Sunday.

(E) *Spring Break in Odd Numbered Years.* Husband is to have the children during Spring Break in odd numbered years, beginning at 6:00 p.m. on the last day before the School Spring Break begins and ending at 4:00 p.m. on the day before school resumes.

(F) *Miscellaneous Visitation.* The Husband is to have visitation in even numbered years on Easter and Labor Day and in odd numbered years on Memorial Day and July 4th. All such holiday visitation shall begin at 9:00 a.m. on the morning of said holiday and end at 6:00 p.m. on that same day.

(G) *Summer Visitation.* Husband is to have the children for summer visitation for two (2) week periods of his choice during the summer plus two weeks in November and two weeks in March of each year. Husband is to give Custodial parent a thirty day notice before said visitation is to commence.

(H) *Father's Day and Mother's Day.* Notwithstanding any period of possession otherwise described herein, Custodial parent shall have visitation with the children on Father's Day each year, beginning at 9:00 a.m. and ending at 6:00 p.m. Notwithstanding anything to the contrary hereinabove, the Husband shall have the children on Mother's Day each year beginning at 9:00 a.m. and ending at 6:00 p.m. regardless of who is otherwise entitled to visitation on that day.

(I) *Transportation.* The Husband will provide transportation for the parties minor children so long as both parties are residents of the state of Arkansas; in the event that either party resides outside the state of Arkansas then the issue of transportation of the minor children will have to be re-negotiated and agreed to by the parties.

(J) *Illness.* The sickness of the children shall be no reason to cancel, interfere with or postpone Husband's scheduled visitation unless the parties so agree, or unless the children's regular treating physician has provided written direction that the children should not be moved or taken outside the dwelling.

(K) *Miscellaneous.* Neither Husband nor Custodial parent shall have a non-relative overnight guest of the opposite sex in the home when the

> children are present and neither Husband not [sic] Wife shall make derogatory remarks about the other in the presence of the children or where the children are likely to overhear. Both Husband and Wife agree to maintain an attitude of civility toward the other at all times.

Paragraph g. further provides as follows:

> The parties agree that the Husband and Wife will endeavor to exchange information regarding the children's health, progress in school, social activities, hobbies, schedules for athletic or competitive events, and should make every effort possible to include the other party in the daily activities of the children's lives. Both parties shall make an effort to stay informed of the children's activities and welfare.

3. The Defendant's visitation was as stated in the decree of divorce from December 1998 until July 8, 2005, except for a brief intervening period wherein the Circuit Court of Cleburne County, Juvenile Division case no. JV 2001-191 the Honorable Judge Steven Choate entered several orders in a "Family in Need of Services" case. The FINS case was filed in September 2001 and served on the Plaintiff on October 1, 2001. The first hearing was scheduled on October 12, 2001 and that hearing was continued by an order which stated "no visitation to be missed under any circumstances." On November 16, 2001 the second barn visit with counselor Miles present occurred and the Defendant received no visitation from that date until December 28, 2001 when Judge Choate entered an order stopping all visitation until the Defendant met with a Dr. Thomas. The meeting with Dr. Thomas occurred shortly after December 28, 2001. After the meeting with Dr. Thomas only very limited supervised visits on Plaintiff's

terms occurred and visitation according to the decree of divorce never occurred. By February 2002 the FINS case was dismissed and visitation in this matter was again litigated in the divorce case and visitation was as set out in the orders of the divorce matter herein.

4. By Order of Continuance entered on October 3, 2002 and filed for record on October 22, 2002 the parties jointly agreed to continue the hearing of pending motions to modify the 1998 decree of divorce. In that agreed order the parties consented to the appointment of an Attorney Ad Litem and agreed to follow the recommendations of the Ad Litem. Further, in that agreed order the parties consented "that all parties shall be ordered to participate in counseling with a single person to not include either the minor children's therapist Dr. Bethel "Bo" Thomas, or the Defendant's therapist Sheldon Rappaport" and agreed to follow the recommendations of the selected therapist. Finally, the parties consented to being "enjoined and restrained from making derogatory statements about the other party in front of the minor children or otherwise be subject to the contempt powers of the Court." The order of October 3, 2002 did not modify the Court ordered visitation but did attempt to put in place some tools to assist in making the Defendant's visitations, which were becoming increasingly disastrous, successful.

5. From the record of the proceedings in this matter on the 8th day of July, 2004, a typed transcript of which was entered into evidence in this matter, the Court ordered compliance with the following modified agreed visitation. This order was the first and only modification in this divorce case of the Court's visitation set out in the 1998 decree of divorce. Counsel for the parties read the following and the Court approved the same.

BY MR. PETTY: Mr. Johnson – Mr. Johnson agrees, Your Honor, that the open and liberal visitation as set out in your 1998 order will until the August 8th date – 9th date be four afternoons a week from 5:00 till 8:00 o'clock in a public location with these children each week until we return."

BY MR. AYDELOTT: The days specifically are Monday, Tuesday, Friday, and Saturday. And the Exchange is to be at McDonald's.

The record is clear and unambiguous that visitation set out on July 8, 2005 was to be in place until the parties returned to court. The Plaintiff testified that she was present when the visitation agreement of July 8, 2004 was read into the record. The parties returned to Court on September 16, 2005 at which time this hearing began.

VISITATION

6. From the outset the Plaintiff has willfully and wantonly refused to comply with the visitation in the decree of divorce and engaged in a protracted campaign to alienate the children from the Defendant and to inculcate a hatred of the Defendant in the minds of the minor children. Defendant testified that the children would refuse to go to visitations and would fight and kick and scream to resist visitations. This resistance grew more pronounced over the years since the separation of the parties. Defendant frequently was unable to have visitation because the children refused to go and the Plaintiff would not meaningfully support the Defendant's efforts to accomplish visitation. The Plaintiff would refuse to answer the Defendant's calls to arrange visitation and when she did communicate with the Defendant would frequently

come up with excuses why the children could not attend their visitation. When the children did attend visitation they would frequently refuse to eat or speak and on occasions would refuse to sit at the same restaurant table with their father. Although the Plaintiff denies it, the evidence shows that the Plaintiff asked the Defendant not to appear at the children's extracurricular events and allowed the children to dictate if visitation would occur. The Plaintiff allowed the children to call themselves by the "Cockrill' or "Linder" surname because they wanted to.

7. The Plaintiff failed to allow the Defendant to be a part of the children's lives and stay involved in their lives. The Plaintiff married and moved from Cleburne County to Cabot and moved the children to the Cabot School District without first notifying the Defendant. Defendant's visitation per the divorce decree never consistently occurred before the FINs case was filed or after the FINs case was dismissed due to Plaintiff's insistence and despite Defendant's efforts.

8. The minor children cannot remember the last time they had extended summer visitation with their father. The Plaintiff and the children testified that they never received Defendant's letters in Florida which the Defendant mailed to the addresses provided by Plaintiff's counsel.

9. The Plaintiff from the start encouraged and repeated horrific stories of abuse perpetrated by the Defendant which have no substance. The Plaintiff believes, repeats and has perpetuated the stories of Defendant's repeated beatings of the minor children with a steel spiked ping pong paddle, Defendant putting his finger through the minor child Keith's ear, the children being

locked out of the house for hours, the children being placed into time out for hours, and other abuse at the hand's of the Defendant and his family. The Court finds that the Plaintiff's testimony is lies, half truths and wild exaggerations about the Defendant and that the Plaintiff has engaged in a protracted campaign alienating the children from their father. The children's testimony further reflects the Plaintiff's coaching and irrational alienation of the Defendant.

10. The visitations at the barn where the children refused to exit the vehicle to commence visitation are further evidence of the Plaintiff's insidious sabotage of the Defendant's visitation. At the second barn visit where Counselor Miles advised the Defendant it is a telling fact that the urgent telephone call made by Mrs. Cleek, the driver, was to Plaintiff's lawyer. It is apparent that this visit was destined to fail based upon Plaintiff's preparations for the failure and exaggerated response to the visit.

State Trooper Holland who immediately investigated the incident and inspected the children found their injuries to be "red marks." The Plaintiff and the children reported extensive and black and blue bruising although they have lost the video taken by Plaintiff to document the abuse. Plaintiff and the children's reports of abuse in this instance too are not believable. The admission that the Plaintiff videotaped the post visitation state of the children on this occasion too further demonstrates the Plaintiff's efforts to alienate the children from the father. Further State Trooper Holland found the children's stories to be "unnatural" and he agreed that the children said absurd things and appealed coached.

11. The minor children are unable to articulate why they are afraid of the Defendant. The minor children are unable to articulate why they are afraid of Defendant's father Earl Johnson. Keith has no scar from the horrific "whole in the ear" allegation, no medical evidence of abuse is presented, no DHS reports of abuse are investigated nor founded, no police investigation of abuse if offered.

12. The minor children appear in pictures of their visitations with the Defendant to be normal and happy although the children substantially deny enjoying the sporadic visitation times with the Defendant. Incredibly, the children report being beaten to appear and smile in the photographs.

13. Plaintiff orchestrated the systematic alienation of the children from the Defendant. Plaintiff has insisted on supervised visitation when no credible proof of physical or emotional abuse exists. Plaintiff has used the supervised visitation and perpetuation of the wild exaggerations to Dr. Thomas which has empowered the children to demand less and less visitation over the years and to resist and refuse visitation.

14. Paul Deyoub PhD., an expert agreed upon by the parties and appointed by order of the Court found that "Ms. Linder (Plaintiff) has engaged in a campaign of denegration toward the father." Deyoub further found "this is a campaign that has no justification" and "the allegations of abuse against the father are incredulous and extreme" and "the allegations to be preposterous regarding abuse of the children." Further, Deyoub concluded, and the Court finds that the alienation of the father began from the very first visitation. *See Report of Paul Deyoub PhD. dated 9-13-2005.*

15. The Plaintiff taped a post visitation interview with the minor child Keith Johnson even before the final decree of divorce was entered. This video demonstrates the Plaintiff's willingness to rehearse, coach and impress the children to hate their father. The Plaintiff assisted the children in audio taping at least two of the July-August 2004 visits. Although the audio tape is too garbled to hear, the Plaintiff's act of placing the children in the position of gathering evidence in a contested custody case is deplorable and clearly designed to frustrate, defeat and sabotage the Court ordered visitation and the children's relationship with their father.

16. The testimony of the parties is consistent that visitation did occur from July 8, 2004 until August 9, 2004 according to the July 8, 2004 transcript of the Court's order. However, on August 9, 2004 the Plaintiff, without informing the Defendant, left for Florida and stayed there enrolling the children in school in Florida. The Defendant was not aware of her location until September 2004 when Plaintiff's counsel advised Defendant's counsel. From August 9, 2004 until November 2004 the Defendant had no contact with his children. In November 2004 the Defendant saw his children very briefly at Pizza Hut in Cleburne County for one short and uncooperative visit. After November 2004 the Defendant has not seen his children until this hearing.

17. The Plaintiff testifies that she was unclear what visitation was in place after August 9, 2004. Regardless of whether Plaintiff believed that the decree of divorce visitation was in place or whether the four days per week visitation continued past August 9, 2004 the Plaintiff did neither. The Plaintiff cannot possibly justify the absence of visitation after August 9, 2004. The record is clear and

unambiguous that visitation set out on July 8, 2004 was to be in place until the parties returned to court. It was in an attempt to flee this visitation that Plaintiff fled to Florida. Plaintiff was advised by competent counsel at the time of her move to Florida and it is not credible that she was unclear whether Defendant had visitation at that time.

18. The Plaintiff made no effort to select a therapist in response to the October 3, 2002 order and testified that she believed it was the attorney's responsibility. Ironically, when two of her attorneys approved the appointment of Dr. Paul Deyoub as the court appointed expert in July of 2005 she now incredibly states that she objects to that too. The Plaintiff wanted to continue seeing Dr. Thomas, who consistently proposed only supervised visitation to the Defendant. The Plaintiff failed to make an effort to select a new therapist.

19. Plaintiff testified in Court that she will abide by the orders of this Court but on the condition that she is "able to sleep at night." When pressed by counsel she reluctantly testified that she will abide by the orders of the Court. This testimony stands in sharp contrast to Plaintiff's conduct and repeated statements to Dr. Deyoub that she will not cooperate with forced visitation. Plaintiff's conduct since entry of the divorce decree is to openly thumb her nose at the orders of this court and she admitted as much to Dr. Deyoub. Plaintiff gives the Court no hope that she will abide by the orders of this Court if she remains the custodial parent.

20. Plaintiff did not deny to Dr. Deyoub, the Court appointed expert, that she moved to Florida to avoid the case in Cleburne County and justified her actions by stating that the year without having to see their father

was the best year of the children's lives. *See Report of Paul Deyoub PhDd.* [sic] *dated 9-13-2005.* The Court finds that the Plaintiff moved to Florida in bad faith and primarily to further frustrate the Defendant's visitation.

21. Defendant most recently requested visitation in July 2005 in writing through his counsel Holly Meyer in a letter to then Plaintiff's attorney Paul Petty. Again in August 2005 the Defendant requested visitation in writing through his counsel Holly Meyer in a letter to current Plaintiff's attorney Lisa Jones-Ables. The Defendant received no visitation in response to these requests. The Defendant received no visitation, no telephone calls, no letters, and no shared information about the status of his children since November 2004.

MEDICAL BILLS

22. The Plaintiff has testified that the Defendant owes medical bills for the minor children but is unable to state with certainty an amount and what insurance if any has been used in payment of the children's medical bills. The Court reserves ruling on this single issue and shall permit the Plaintiff to Petition the Court within the next 30 days to address that issue.

23. The Husband shall continue to maintain health insurance on the parties minor children when reasonably available through his employer at a reasonable cost. The parties shall divide equally all medical, dental, orthodonic, optometric, mental health, prescription or other reasonable health related expenses of the minor children. The party incurring the bill shall be responsible to timely provide the bill to the opposing party ant [sic] the opposing party shall be responsible to promptly pay their one half of

same. The parties shall share insurance cards on the minor children.

CUSTODY AND VISITATION

24. The Court finds that it is in the best interest of the minor children that custody of the minor children be with the Defendant effective immediately. Immediate physical custody of the minor children shall be to the Methodist Behavioral Hospital in Maurnelle Arkansas pursuant to this order of September 24, 2005. Physical custody of the children shall be with the Defendant upon discharge form [sic] the Methodist Behavioral Hospital.

25. It is in the minor children's best interest that Plaintiff shall have no visitation with the minor children and no unsupervised contact with the minor children directly, indirectly, through any mode of communication or agent at this time. The Plaintiff may petition the Court for supervised visitation upon her release from incarceration and after one year.

CHILD SUPPORT

26. Defendant shall receive child support from Plaintiff through the Child support clearinghouse on each child until that child graduates from high school or reaches the age of eighteen whichever is later. Child support shall be set effective September 24, 2005 at $35 per week, the minimum, until Plaintiff gains employment. Child support in this matter shall be set in accordance with Administrative Order Number Ten of the Supreme Court of Arkansas and the Arkansas Family Support

Chart. Plaintiff shall be required to pay the annual administrative fee for the OCSE Clearinghouse.

CONTEMPT

27. Among the other issues and pleadings, the Plaintiff's Counter-Petition for Contempt and Amended Counter-Petition for Contempt and Defendant's Petition for Contempt and Amended Petition for Contempt are before this Court. Upon proper notice to both parties, upon statements of counsel, upon oral testimony in open court, upon exhibits introduced into evidence and on the record as a whole, from the findings of fact herein, from all of which it appears to the Court that both Plaintiff's and Defendant's petitions for contempt are well founded. The parties herein have had the ability to comply with the orders of this court and have willfully failed to do so and are both in contempt of this court.

28. Defendant Deron Johnson was ordered in the decree of divorce to pay child support in "the sum of $95.00 week for support of the minor children . . . The first payment shall be due on Thursday, December 17, 1998 and then on every Thursday." It is undisputed in the testimony of the parties that Defendant has at times since entry of the decree of divorce failed to make regular weekly child support payments, has at times been behind in his support, and at times made lump sum payments to get current on his child support. The Defendant is in contempt for his failure to abide by the Court order in this respect. The Defendant has, however, purged himself of contempt by making child support payments sufficient to retire child support arrearages and is in substantial compliance with his child support obligation according to record of this hearing.

29. Plaintiff has disobeyed the orders of this Court in regard to: (1) failing to accomplish, even working to defeat, visitation as set in the decree of divorce and the July 8, 2004 modified visitation by a sustained campaign of alienating the children and frustrating visitation as set out herein; and (2) failing to select a new counselor and failing to refrain from making derogatory comments about the other party in front of the minor children according to the order of October 2002; and (3) failing to communicate about the children as ordered in the decree of divorce. For this extraordinarily egregious conduct the Plaintiff is found to be in willful contempt and shall be incarcerated for a period of one year from September 24, 2005.

IT IS SO ORDERED.

/s/ Tim Weaver
Honorable Tim Weaver
Circuit Judge

Approve as to form:

/s/ Holly Meyer
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Leslie W. Steen
Clerk

January 17, 2007

Ms. Lisa Jones-Ables
Attorney at Law
217 W. 2nd Street, Suite 303
Little Rock, Arkansas 72201

RE: CA 06 00033
Jennifer Linder (Johnson) v. Deron Johnson

Dear Ms Jones-Ables:

The Arkansas Court of Appeals made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:sc
cc: Holly L. Meyer
Cleburne Circuit Clerk
(No. E-98-133-1)